CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

December 23, 1993

Date: January 6-7, 1994	*Place:* Sacramento
January 6 (Thursday) 10:00 am – 5:00 pm January 7 (Friday) 9:00 am – 4:00 pm	State Capitol Room 112

Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. **If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.**

Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the "California Law Revision Commission".

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

January 6-7, 1994

1. MINUTES OF NOVEMBER 18-19, 1993, MEETING

   (sent 12/9/93)

2. ADMINISTRATIVE MATTERS

   1994 Work Schedule
   Memorandum 94-4 (NS) (sent 12/15/93)

   Communications from Interested Persons

3. TRIAL COURT UNIFICATION (Study J-1000)

   Comments on Tentative Recommendation
   Memorandum 94-1 (NS) (to be sent)
   Tentative Recommendation (sent 11/24/93)

   Appellate Jurisdiction (Study J-1060)
   Memorandum 94-5 (RJM) (sent 12/9/93)

Geographical Districts (Study J-1030)
Memorandum 94-6 (NS) (sent 12/9/93)

Election of Judges (Study J-1080)
Memorandum 94-7 (BSG) (to be sent)

4. ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS (Study J-801)

   Draft of Recommendation
   Memorandum 94-3 (RJM) (to be sent)

5. COMPREHENSIVE POWERS OF ATTORNEY STATUTE (Study L-3044)

   Comments on Tentative Recommendation
   Memorandum 94-2 (SU) (sent 12/21/93)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JANUARY 6-7, 1994
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on January 6-7, 1994.

Commission:

Present Sanford Skaggs, Chairperson
Daniel M. Kolkey, Vice Chairperson
Christine W.S. Byrd (Jan. 7)
Allan L. Fink
Edwin K. Marzec (Jan. 6)
Colin Wied

Absent: Terry B. Friedman, Assembly Member
Bion M. Gregory, Legislative Counsel
Bill Lockyer, Senate Member
Arthur K. Marshall

Staff:

Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Robert J. Murphy, Staff Counsel
Helen Mell, Pro Bono Attorney (Jan. 6)

Other Persons:

Carl West Anderson, First Appellate District, San Francisco (Jan. 6)
Scott Beseda, Administrative Office of the Courts, San Francisco (Jan. 6)
Steve Birdlebough, Judicial Council of California, Sacramento
Don E. Green, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (Jan. 7)
Janis R. Hirohama, Los Angeles County Municipal Courts, Planning and Research Unit, Los Angeles
Charlotte Sato, California Attorney General's Office, Sacramento (Jan. 7)
Jon D. Smock, California Defense Counsel, Sacramento
Thomas J. Stikker, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (Jan. 7)
Marcia Taylor, Judicial Council/Administrative Office of the Courts, San Francisco (Jan. 6)
Linda Theuriet, Administrative Office of the Courts, San Francisco (Jan. 6)
Roger K. Warren, Judicial Council of California, Sacramento (Jan. 6)

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MINUTES OF NOVEMBER 18-19, 1993, MEETING

The Minutes of the November 18-19, 1993, Commission meeting were approved as submitted by the staff except that on page 8, the paragraph beginning at line 9 was revised to read:

> The words "may be" were substituted for the words "is arguably" in the sentence, "This requirement is arguably improper since the California Constitution sets the exclusive qualifications for superior court judges and does not include a residency requirement."

ADMINISTRATIVE MATTERS

Tribute to Commissioner Plant

Chairperson Skaggs paid tribute to the outstanding service of former Commission member Forrest A. Plant, whose term of office had expired. On behalf of the Commission the Chairperson executed a certificate of appreciation to be presented to Commissioner Plant for his distinguished tenure on the Commission.

Introduction of Commissioner Fink

Chairperson Skaggs introduced new Commission member Allan L. Fink, who has been appointed to replace Commissioner Plant. Commissioner Fink is a member of the San Francisco firm of Severson & Werson.

1994 Work Schedule

The Commission adopted the following meeting schedule for 1994:

January 1994	**San Francisco**
Jan. 21 (Fri.)	10:00 am – 4:00 pm
February 1994	**Sacramento**
Feb. 10 (Thur.)	10:00 am – 5:00 pm
Feb. 11 (Fri.)	9:00 am – 4:00 pm
March 1994	**Sacramento**
March 24 (Thur.)	10:00 am – 5:00 pm
March 25 (Fri.)	9:00 am – 4:00 pm

May 1994	**Sacramento**
May 12 (Thur.)	10:00 am – 5:00 pm
May 13 (Fri.)	9:00 am – 4:00 pm
June 1994	**San Francisco**
June 9 (Thur.)	10:00 am – 6:00 pm
June 10 (Fri.)	9:00 am – 4:00 pm
July 1994	**Los Angeles**
July 14 (Thur.)	10:00 am – 6:00 pm
July 15 (Fri.)	9:00 am – 4:00 pm
September 1994	**Sacramento**
Sep. 22 (Thur.)	10:00 am – 5:00 pm
Sep. 23 (Fri.)	9:00 am – 4:00 pm
November 1994	**Los Angeles**
Nov. 10 (Thur.)	10:00 am – 6:00 pm
Nov. 11 (Fri.)	9:00 am – 4:00 pm

The January 21 date should be held for the possibility that a meeting will be needed to review problems in the final draft of the trial court unification report. Otherwise, that meeting will be canceled. If a meeting must be held, the staff should investigate whether a telephonic meeting would be permissible under the state open meeting law.

The February 10-11 meeting should be devoted to resolving transitional personnel issues for trial court unification and addressing requests for exemption from the administrative procedure statute. To the extent possible, the administrative law material should be taken up in a concentrated manner so there is continuity in consideration of the issues.

The Commission will wait until the June or July meeting to determine whether to augment its meeting schedule for the last half of 1994, based in part on whether the trial court unification constitutional amendment is approved by the voters in June and in part on the outcome of the budget process for the 1994-95 fiscal year. The Commission also will be in a position at that time to determine whether to extend existing consultant contracts on other matters if it looks like those matters will not be on the agenda for some time.

Staff resources during the first half of 1994 should be devoted 1/3 each to the subjects of trial court unification, administrative law, and creditors' remedies.

However, Commission meeting time through June should be limited to administrative law and creditors' remedies matters in an effort to wind up work on administrative adjudication and to meet statutory deadlines on creditors' remedies. This would also clear the decks for intensive Commission work on trial court unification beginning in July if the constitutional amendment is approved at the June primary. The July meeting would kick off with work prepared by the staff during the first half of year.

The creditors' remedies matters should be addressed by circulation of a questionnaire to interested persons and a review of the literature, rather than by an initial staff study. Letters soliciting comments could be circulated to bar associations and court commissioners, among others, for the most expeditious and cost effective manner of dealing with these matters.

Communications From Interested Persons

The Executive Secretary reported that the Commission has received an invitation from the Los Angeles County Superior Court to submit an amicus curiae brief on the constitutionality of the probate creditor claims statute, enacted on Commission recommendation. The Commission declined to submit a brief. As a matter of policy the Commission historically has deemed it inappropriate and inadvisable to become involved in litigation. There is also a question of the Commission's statutory authority.

STUDY J-801 — ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

The Commission considered Memorandum 94-3 and the attached staff draft of the recommendation on orders to show cause and temporary restraining orders. The Commission approved the recommendation for printing and submission to the Legislature.

STUDY J-1000 — TRIAL COURT UNIFICATION

The Commission considered Memoranda 94-1 and its First Supplement, 94-5, 94-6, and 94-7, together with the tentative recommendation dated 11/24/93, and a letter from the Judicial Council dated January 5, 1994 (attached to these Minutes as an Exhibit), relating to revisions of the tentative recommendation on trial court unification. The Commission made the following revisions to the tentative recommendation and approved it for printing and submission to the

Legislature as a final recommendation. The explanatory material in the summary and text of the tentative recommendation should be revised to conform with Commission decisions concerning constitutional and statutory language. The staff is to circulate a copy of the final draft to Commission members before submitting it to the Legislature, with an opportunity for Commission members to request further consideration of any matter before submission. January 21 was held open as a meeting date for this purpose, but a meeting will not be held if further consideration of matters is not required.

Preliminary Part of Recommendation

The sentence on page 9 of the tentative recommendation that reads "This will help focus the election debate over the constitutional amendment on the overall merits of unification rather than on incidental details" was deleted.

The comments at page 21 of the tentative recommendation regarding comparative screening of municipal and justice court judges was deleted.

The sentence on page 27 of the tentative recommendation that reads "The campaign financing required for countywide races could lessen judicial independence and make the offices more highly politicized than they are now" was deleted.

The sentence on page 42 of the tentative recommendation that reads "The ultimate goal should be to get all persons who are in the same class on the same pay scale and with the same benefits" was deleted.

The following comments were added at page 9 of the tentative recommendation:

> The trial court unification recommendation need not seek to shift the existing balance of power between the legislative and judicial branches of government. Regardless of the merits of the existing constitutional allocation of authority to control matters of court organization and operations, a change in the existing situation should not be injected as an element in the debate over trial court unification.

Cal. Const. Art. I, § 16. Trial by jury

The Los Angeles County Bar Association Litigation Section is opposed to eight person juries and would delete the sentence in proposed Article I, Section 16 that reads: "In civil causes within the appellate jurisdiction of the superior court the Legislature may provide that the jury shall consist of eight persons or a

lesser number agreed on by the parties in open court." Deletion of this sentence would change the existing balance of power, eliminating a power currently accorded to the Legislature. Consistent with its overall philosophy of preserving the existing balance of power and avoiding changes not necessitated by trial court unification, the Commission rejected this proposal.

The Commission decided, however, to revise the sentence to read: "In civil causes other than causes within the appellate jurisdiction of the court of appeal the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court." Unlike the language in the tentative recommendation, this formulation authorizes the Legislature to provide for eight person juries in nonappealable causes, as well as in causes appealable to the appellate division of the superior court.

Cal. Const. Art. V, § 13. Powers of attorney general

The Executive Secretary explained that under the current Constitution, the Attorney General lacks authority to prosecute cases within the jurisdiction of the municipal and justice courts. The tentative recommendation inadvertently changes this, since the Attorney General's authority to prosecute any cases within the jurisdiction of the superior court would be expanded by expansion of the jurisdiction of the superior court.

The Commission considered whether the Attorney General's power should be expanded in this manner. The Commission decided against such an expansion, preferring to maintain the status quo rather than make changes beyond the scope of trial court unification, subject to agreement of both the Attorney General and the district attorneys that an expansion would be appropriate.

Article V, Section 13 of the California Constitution should be amended to read:

> Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any

> law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law, other than causes of which the superior court shall have appellate jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.
>
> **Comment.** Section 13 is amended to reflect unification of the superior courts, municipal courts, and justice courts in a county-based system of superior courts of general jurisdiction. See Article VI, Section 4 (superior court) and former Section 5 (municipal court and justice court).
>
> The amendment preserves the authority of the Attorney General with respect to prosecution of matters of a type formerly within the superior court, as opposed to municipal and justice court, jurisdiction. The appellate jurisdiction of the superior court includes criminal causes other than felonies and civil causes prescribed by statute. Article VI, Section 11 (appellate jurisdiction).

At the request of the Attorney General's office, the Commission agreed to give the Attorney General an opportunity to develop alternate language with the district attorneys, to be inserted in the draft before the final recommendation is submitted to the Legislature.

Cal. Const. Art. VI, § 1. Judicial power

The Commission reconsidered whether "superior court" would be the best name for the unified trial court. The Judicial Council expressed preference for the name "district court," reasoning that use of the preexisting name "superior court" would cause confusion due to the large volume of existing jurisprudence referring to the current superior courts.

For the reasons expressed in the tentative recommendation, however, the Commission decided to stick with the name "superior court." In reaching this determination, the Commission rejected not only the name "district court," but also the name "county court," which implies provinciality and belies the statewide process of the court. The tentative recommendation should be augmented to include these objections to the name "county court."

Cal. Const. Art. VI, § 6. Judicial Council

In its letter dated January 5, 1994 (see Exhibit to these Minutes), the Judicial Council renewed three of four suggestions it made regarding amendment of

Article VI, Section 6 of the California Constitution: (1) changing the terms of membership on the Judicial Council from two years to three years; (2) adding two court administrators as non-voting members of the Judicial Council, and (3) specifying in the Constitution that the Judicial Council is the policy-making body for the courts, and that the Chief Justice is the chief executive officer for the courts, responsible for implementing the rules promulgated by the Judicial Council. The Commission previously rejected these changes as beyond the scope of trial court unification.

On behalf of the Judicial Council, Judge Roger Warren informed the Commission that the these three changes are noncontroversial and simply reflect existing reality as to how the Judicial Council operates. Judge Warren also mentioned that representatives of the Judicial Council had discussed the changes with Senator Lockyer's chief of staff, who stated that Senator Lockyer would have no objection to incorporating the changes into SCA 3.

The Commission decided that the preliminary text of its recommendation should be revised to set forth the three proposed changes, explain that the changes would merely conform the Constitution to existing practice, and state that the Commission has no objection to the changes. Because the changes are not strictly essential for trial court unification, the Commission chose this manner of incorporating them, rather than putting them directly into its proposed constitutional text. The changes may facilitate trial court unification, however, by assisting the functioning of the Judicial Council, which will have a central role in implementing trial court unification. The Commission's report to the Legislature should explain why the changes were not circulated in the tentative recommendation, and should trace the history of the Judicial Council's position regarding amendment of Article VI, Section 6.

Cal. Const. Art. VI, § 10. Original jurisdiction

At its November 1993 meeting, the Commission discussed at length how to draft Article VI, Section 10 of the California Constitution. After revisiting this issue, the Commission settled on the following language:

> The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition , but a superior court may not exercise that jurisdiction

> in such proceedings directed to the superior court except by its appellate division .
>
> Superior courts have original jurisdiction in all causes ~~except those given by statute to other trial courts~~ .
>
> The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

The Commission made this change from the tentative recommendation purely to improve the clarity and readability of the constitutional provision, not because there is any substantive difference between it and the tentative recommendation.

Cal. Const. Art. VI, §11. Appellate jurisdiction

On the issue of appellate jurisdiction, the Commission heard from Justice Anderson, the Administrative Presiding Judge of the First Appellate District in San Francisco. Justice Anderson challenged the assertion at pages 15-16 of the tentative recommendation that "If the number of appeals from trial court judgments in a unified court are roughly equal to the combined number of existing superior court, municipal court, and justice court appeals, the court of appeals workload could increase by about 25%." He maintains that the court of appeals workload is likely to double, rather than to increase by about 25%. In his view, once the trial court is unified, more judges will be assigned to the types of cases appealable to the courts of appeal, thus dramatically increasing the workload of those courts. Because the courts of appeal are already overburdened, he believes that measures to make their workload manageable are essential. In particular, he urged that appellate review be made discretionary, rather than mandatory. He thought that this could be accomplished by statute, as opposed to a constitutional provision.

The Commission decided that the preliminary part of its tentative recommendation should be revised to state with greater emphasis that unification may increase the workload of the courts of appeal. The Legislature should take this into account in the context of SCA 3, and consider how to relieve the increased burden on the courts of appeal. The Commission's report should mention this. Additionally, the Commission will consider the problem when it focuses on the statutory aspects of trial court unification.

In light of his concerns regarding the workload of the courts of appeal, Justice Anderson further suggested deleting the part of the tentative recommendation that states: "[T]rial court unification should not be the occasion for making

substantial changes in fundamental concepts of justice and reviewability." The Commission decided that in its report on the constitutional aspects of SCA 3, it could limit this sentence to changes of constitutional dimension.

The Commission also considered whether to revise the part of its tentative recommendation concerning the jurisdiction of the appellate division. The tentative recommendation would amend Article VI, Section 11 of the California Constitution in part as follows:

> The appellate division has appellate jurisdiction in criminal causes other than felonies, and in civil causes prescribed by statute or by rule adopted by the Judicial Council not inconsistent with statute.

Rather than using the phrase "prescribed by statute," the tentative recommendation should have incorporated the phrase "provided for by statute," as the Commission decided at its November 1993 meeting. Unlike the phrase "prescribed by statute," that phrase would include action taken by the Judicial Council pursuant to a legislative delegation of authority. Thus, the phrase "or by rule adopted by the Judicial Council not inconsistent with statute" can be regarded as surplusage. The staff therefore proposed deleting that phrase. See Memorandum 94-1 at page 6. In contrast, the Judicial Council proposed deleting the words "by statute or," but retaining the phrase "by rule adopted by the Judicial Council not inconsistent with statute." See Exhibit p.1.

The Commission rejected both proposals. The language proposed by the Judicial Council could be interpreted to require a Judicial Council rule in every instance, but the Commission previously decided that the Legislature should be able to act on its own initiative. Further, although the staff's proposal would not be a substantive change, it was not circulated for comment, whereas the tentative recommendation was circulated. The Commission therefore decided to adhere to the language in its tentative recommendation, with the proviso that "prescribed by" be changed to "provided for."

The Commission also decided to adhere to the part of its tentative recommendation stating that "Judges shall be assigned to the appellate division by the Chief Justice for a specified term pursuant to rules not inconsistent with statute adopted by the Judicial Council to encourage the independence of the appellate division." Due to the existence of statutory provisions, the staff had proposed moving the reference to assignment by the Chief Justice for a specified

term from the Constitution to the Comment. In contrast, the Los Angeles County Bar Association Litigation Section had proposed retaining the constitutional language, but specifying in the Constitution that appointments to the appellate division would be for a three year term. Because the language in the tentative recommendation was a compromise reached after extensive discussion, neither of these conflicting suggestions was enough to convince the Commission to change its approach.

To improve clarity, the Commission did, however, decide to change the phrase "encourage the independence of the appellate division" to "promote the independence of the appellate division." The Commission also decided to substitute the phrase "courts exercising their appellate jurisdiction" for the potentially confusing phrase "appellate courts and appellate divisions" in the last paragraph of Article VI, Section 11.

Finally, the Commission considered whether its tentative recommendation eliminates legislative authority to make matters nonappealable. See Memorandum 94-5. In effect, the tentative recommendation seemingly would make every matter appealable, either to the courts of appeal or to the appellate division of the superior court. Statutes purporting to make certain cases nonappealable would therefore be unconstitutional.

It is unclear, however, whether a constitutional right of appeal exists at present. The case law on this point conflicts. It is arguable that existing statutes making matters nonappealable are unconstitutional.

Given the inconclusive case law, the Commission was reluctant to take a position on it in the context of SCA 3. Rather, the Commission sought simply to avoid this potentially controversial issue and leave the Constitution unchanged with regard to the existence or nonexistence of a constitutional right of appeal. The Commission discussed at length how to accomplish this, and finally decided to amend Article VI, Section 11 as follows:

> The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.
>
> Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.
>
> An appellate division shall be created within each district court. The appellate division has appellate jurisdiction in criminal causes

other than felonies, and in civil causes provided for by statute or by rule adopted by the Judicial Council not inconsistent with statute, that arise within that district court. The Judicial Council shall adopt rules to ensure the independence of the appellate division.

The courts of appeal have jurisdiction of all other appeals and in other causes prescribed by statute.

The Legislature may permit appellate courts exercising their appellate jurisdiction to take evidence and make findings of fact when jury trial is waived or not a matter of right.

Cal. Const. Art. VI, § 16. Election of judges

The Executive Secretary suggested that instead of specifying that superior court judges be elected countywide, the Constitution should leave open the possibility of elections in smaller districts. The Commission could then "make the case for countywide elections in [its] statutory recommendations to the Legislature." Memorandum 94-6 at page 5. This approach would leave the Constitution flexible, allowing for legislative accommodation to the needs of large counties (*e.g.*, Los Angeles County) if necessary. The Judicial Council opposed this proposal, favoring constitutionally mandated countywide elections.

The Commission agreed with the Judicial Council and stuck with its tentative recommendation regarding countywide elections.

The Executive Secretary also raised the issue of when superior court appointees should stand for election. The Constitution presently provides that "[a] vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy." The tentative recommendation would revise this provision to read: "[a] vacancy shall be filled by election to a full term at the next general election after the third January 1 following the vacancy." By lengthening the interval between the vacancy and the election, this amendment might improve recruitment of superior court appointees, prevent voters from having to vote for appointees without a significant judicial track record, and decrease the likelihood that judicial decisions and election results will be influenced by the popularity of particular views.

As explained in Memorandum 94-7, however, in some instances the amendment could mean that an appointee serves as much as five years (almost an entire six year term) before being replaced by an elected judge, or commencing his or her own elected term. This could be viewed as a significant incursion on the right of the electorate to select its superior court judges, a right that the California Supreme Court has repeatedly emphasized in decisions

regarding superior court appointments. The staff recommended against the amendment, reasoning that it was beyond the scope of SCA 3 and could unnecessarily complicate the debate on SCA 3.

On behalf of the Judicial Council, which originally proposed the amendment, Judge Roger Warren stated that the intent of the amendment was not to undermine the right of the electorate to select their judges, but rather to ensure that appointees have a meaningful judicial track record for voters to evaluate before standing for election. He said that the Judicial Council had not analyzed the effect of the proposed amendment in as much detail as in Memorandum 94-7. Because it received the memorandum only a few days before the meeting, the Judicial Council had not completed its reevaluation of the amendment by the time of the meeting.

It was suggested that the amendment could be modified to substitute the word "second" for the word "third." This would still confer the benefits of lengthened appointments (but to a lesser degree), while decreasing the impact on the public's right to vote.

The establishment of a minimum appointment period, such as the ten month period now applicable to municipal court appointments, was also suggested. This would make appointments more uniform in duration than under the proposed amendment.

After exploring these alternatives and considering the competing considerations, the Commission decided to leave its tentative recommendation unchanged. The Commission further decided:

> (1) The proposed amendment of Article VI, Section 16(c) does not modify the rule of *Pollack v. Hamm,* 3 Cal. 3d 264, 475 P.2d 213, 90 Cal. Rptr. 181 (1970), that successive appointments do not retrigger the grace period before election. The Comment should make this point.
>
> (2) The proposed amendment does not change the rule of *Stanton v. Panish,* 28 Cal. 3d 107, 615 P.2d 1372, 167 Cal. Rptr. 584 (1980), that an appointment made during the final year of a judge's term, at a time when one or more candidates have qualified for election, does not postpone the election. The Comment should make this point.

Additionally, the Comment will be revised to describe more accurately the existing appointment system, as set forth on pages 9-10 of Memorandum 94-7.

The last issue that the Commission addressed regarding Article VI, Section 16 was the use of retention elections. The Commission revisited the question of whether switching to retention elections would help insulate SCA 3 from challenges under the Voting Rights Act. The tentative recommendation maintains the current election process, except "as otherwise required to comply with federal law, in which case the Legislature may provide for election by the system prescribed in subdivision (d) [*i.e.*, retention elections] or by other arrangement." The Commission decided to continue with this approach. It reasoned that mandating the use of retention elections is not essential to accomplish trial court unification, and may interfere with passage of SCA 3.

The Commission also discussed the degree of authority that the Legislature should have to switch to retention elections. Before the Legislature can adopt retention elections, must there be a court determination that federal law has been violated? Would a legislative determination that there is a Voting Rights problem be sufficient to justify such a switch? Should the Legislature be able to switch to retention elections purely on its own initiative, without the specter of a Voting Rights violation prompting such a switch? Arguably, if the Legislature could make such a change purely on its own initiative, that would undermine Article VI, Section 16(d), which gives the electorate the right to decide whether to use retention elections. But if the Legislature cannot switch to retention elections until a Voting Rights failure is established, it may be too late for retention elections to be an adequate remedy. The Commission resolved these issues by deciding to substitute the phrase "***necessary*** to comply with federal law" for the phrase "***required*** to comply with federal law" in Article VI, Section 16(b). A parallel change was made in the discussion of this matter at page 30 of the tentative recommendation.

Cal. Const. Art. VI, § 23. Transitional provision

The tentative recommendation refers to "adoption" of SCA 3 by the voters at the June 1994 primary election. The proper terminology is "approval" of SCA 3, rather than "adoption." Accordingly, the Commission decided that the word "approval" should be substituted for "adoption" in the tentative recommendation.

To conform to the Commission's decision at its November 1993 meeting, the last sentence of subdivision (a) should also be modified to read: "Notwithstanding Section 8 of Article IV, the implementation of, and orderly

transition under, this measure may include urgency statutes that create or abolish offices or change the salaries, terms, or duties of offices, or grant franchises or special privileges, or create vested rights or interests ***where otherwise permitted under this Constitution*** ." This will make clear that the intent is only to waive the constitutional requirements relating to urgency legislation, not any other constitutional restrictions.

With regard to subdivision (b), the terms of some sitting municipal and justice court judges will expire after unification, so they will have to run for election on a countywide basis shortly after unification occurs. The Commission considered but rejected a suggestion that such judges be given additional time before having to stand election. See Memorandum 94-1 at pages 11-12. The Commission reasoned that the sitting judges have judicial track records, and allowing them additional time to establish countywide track records is unnecessary.

The Commission also decided that the last sentence of subdivision (b) should be revised to read, in effect: "***Pursuant to Section 6,*** the Judicial Council may prescribe appropriate education and training for judges ***with regard to trial court unification."*** These changes are meant to clarify that the provision is not intended to narrow the Judicial Council's role regarding education of judges generally.

In the Comment to proposed Article VI, Section 23, the word "all" should be deleted from the phrase "education for all superior court judges may be appropriate."

Operative Date

The tentative recommendation specifies an operative date of July 1, 1995. The Commission considered a suggestion from the Attorney General that the operative date be extended.

A change to January 1, 1996, would give the Legislature a full session in which to act to implement SCA 3 if it is approved in June 1994. It would also give the Commission more time to work on the large and difficult task of preparing statutory recommendations to implement SCA 3, as well as affording greater opportunity for interested parties to reach compromises on the statutory issues. While the July 1 date was selected in part because of the benefits to the courts in coinciding with the start of the fiscal year, it appears that the fiscal problems of a January 1 start date would not be insurmountable.

In light of these considerations, the Commission decided to recommend a change in the operative date to January 1, 1996. The Commission further decided that despite this change in operative date, the urgency legislation waiver set forth in subdivision (a) of proposed Article VI, Section 23 should be retained.

Government Code § 68070.3 (added). Transitional rules of court

The Judicial Council requested that the Commission add the following language to the Comment to proposed Government Code Section 68070.3:

> The Judicial Council is responsible for conducting workshops and training programs involving members of the bench, bar, court staff, and community to establish policies, rules, and procedures for the transition to a unified court. The Council will also provide the needed staff and judicial training to support operations in the unified court.

The Commission agreed to make this change.

Government Code § 68122 (added). Preclearance of trial court unification

The tentative recommendation makes the Attorney General responsible for seeking preclearance of SCA 3. The Commission considered whether the Secretary of State should be assigned this task instead. See pages 12-13 of Memorandum 94-1. The Commission decided not to substitute the Secretary of State for the Attorney General. The Commission approved the Comment that appears on page 13 of Memorandum 94-1. The Comment should not say that the preclearance issues relating to SCA 3 are likely to be more legal than factual in nature, because that may not be the case.

Government Code § 71000 (added). Laws applicable in superior court

Proposed Government Code Section 71000 was merely a stopgap measure meant to apply if other legislation regarding small claims procedures and economic litigation procedures is not enacted before the operative date of SCA 3. The Executive Secretary proposed deleting it as unnecessary. Enacting legislation on these relatively straightforward and noncontroversial subjects before SCA 3 becomes operative should not be a problem, particularly given the Commission's decision to seek delay of the operative date of SCA 3 to January 1, 1996. The Commission's initial report to the Legislature should only include matters that really need to be considered by June 1994. The Commission therefore adopted

the suggestion to delete proposed Government Code Section 71000 from its final report.

STUDY L-3044 – POWER OF ATTORNEY STATUTE

The Commission considered Memorandum 94-2 concerning comments on the tentative recommendation proposing the comprehensive power of attorney law. The Commission also considered the First Supplement to Memorandum 94-2, implementing procedural drafting suggestions, which was distributed at the meeting.

The Commission reaffirmed its decision to move forward with the power of attorney study and to seek introduction of a bill in the current legislative session. Approval to print the recommendation was postponed until the next meeting so that the Commission could give final consideration to the implementation of decisions made at the January meeting. However, the staff was authorized to proceed with preparation of the bill and the search for an author willing to carry the bill for the Commission.

The Commission made the following decisions (other matters were resolved as recommended in the Staff Notes following sections in the draft):

Health Care Issues

Two letters commenting on the tentative recommendation suggested fundamental changes concerning the durable power of attorney for health care. The Commission reaffirmed its policy of not recommending substantive revisions in the health care power statutes before a full study of the subject can be conducted. The current recommendation is predominantly concerned with restructuring and reorganizing the power of attorney statutes, with substantive changes confined to powers of attorney for property and procedural provisions. The recommendation text should note that the Commission has not undertaken a substantive review of the durable power of attorney for health care, and that it would have been premature to do so before the Uniform Health Care Decisions Act had been approved by the National Conference of Commissioners on Uniform State Laws.

Prob. Code § 4016. Definition of capacity

The Commission discussed whether a definition of "capacity" should be included in the statute, how it would be defined, and whether one definition

should apply to the capacity of the principal to execute a power, the capacity of the principal that triggers a springing power or terminates a nondurable power of attorney, and the capacity of an attorney-in-fact to exercise authority under the power of attorney. The Commission declined to include the definition proposed by the State Bar Team (set out as draft Section 4016). The existing standard of capacity to contract should continue to apply, having the benefit of bringing a history of case-law interpretations. The staff was directed to prepare a memorandum giving additional background on capacity to contract and how it would apply in the power of attorney context.

Prob. Code § 4052. Application to transactions under power of attorney

To resolve some technical issues, Section 4052 should be revised as follows:

> 4052. Subject to Section 4050:
>
> (a) If a power of attorney does not refer to the Power of Attorney Law of this state, this division applies to the acts and transactions in this state of the attorney-in-fact where either of the following conditions is satisfied:
>
> (1) The principal executed the power of attorney ~~was executed~~ in this state.
>
> (2) The principal was domiciled in this state when the principal executed the power of attorney ~~was executed by a person domiciled in this state~~.
>
> (b) If a power of attorney ~~refers to~~ provides that the Power of Attorney Law of this state governs the power of attorney or otherwise indicates the principal's intention that the Power of Attorney Law of this state governs, this division applies to acts and transactions of the attorney-in-fact in this state or outside this state where any of the following conditions is satisfied:
>
> (1) The principal or attorney-in-fact was a domiciliary of this state at the time the principal executed the power of attorney ~~was executed~~.
>
> (2) The authority conferred on the attorney-in-fact relates to property, acts, or transactions in this state.
>
> (3) The acts or transactions of the attorney-in-fact occurred or were intended to occur in this state.
>
> (4) The principal executed the power of attorney ~~was executed~~ in this state.
>
> (5) There is otherwise a reasonable relationship between this state and the subject matter of the power of attorney.
>
> (c) A power of attorney subject to this division under subdivision (b) remains subject to this division despite a change in domicile of the principal or the attorney-in-fact, or the removal

> from this state of property that was the subject of the power of attorney.

The staff is also to consider whether it might be best to combine this section and Section 4054 concerning validity and enforceability of powers of attorney governed by the law of other jurisdictions.

Prob. Code § 4054. Recognition of durable power of attorney under law of another state

The Commission discussed the issue of the recognition that should be given durable powers of attorney executed in or under the law of another jurisdiction and the appropriate disposition of the conflict of laws issues that might arise. After discussing a number of different approaches, the Commission decided that the statute should be limited to recognizing the validity and enforceability of such foreign powers, without attempting to resolve all of the conflict of laws issues. (Section 4052 will determine what law applies to transactions taking place in California.) A working version of Section 4054, as revised, is as follows:

> A durable power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction is valid and enforceable in this state, regardless of whether it is executed by a domiciliary of this state.

The staff will prepare a redraft for consideration at the next meeting.

Prob. Code § 4122. Requirements for witnesses

Subdivisions (d) and (e), providing the requirement that at least one witness must be a person who is not related to the principal nor a person who would receive property at the principal's death, should be deleted. Since this requirement was generalized from the rule applicable to the durable power of attorney for health care, deletion from this section will also have the effect of eliminating the requirement as applied to the health care power. (See draft Section 4701.)

Prob. Code § 4203. Liability for acts of predecessor attorney-in-fact

Subdivision (c) should be revised to shield an attorney-in-fact from liability for breaches of the duty of a predecessor:

> (c) A successor attorney-in-fact is not liable for the actions of the predecessor attorney-in-fact~~, unless the successor attorney-in-fact~~

~~improperly permits the predecessor attorney-in-fact's breach of fiduciary duty to continue~~.

Prob. Code § 4205. Delegation of attorney-in-fact's authority

Subdivision (a) should be revised as follows:

> (a) An attorney-in-fact may revocably delegate authority to perform mechanical acts~~, or acts that the attorney-in-fact cannot lawfully perform~~, to one or more persons qualified to exercise the authority delegated.

This will simplify the section without loss of any important rule. The Comment can explain that the attorney-in-fact can delegate acts that only a licensed person can perform, such as legal matters, subject to the attorney-in-fact's oversight.

Prob. Code § 4230. When duties commence

This section should be revised as follows:

> 4230 (a) Except as provided in ~~subdivision~~ subdivisions (b) and (c), a person who is designated as an attorney-in-fact has no duty to exercise the authority granted in the power of attorney and is not subject to the other duties of an attorney-in-fact, regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act.
>
> (b) Acting for the principal in one or more transactions does not obligate an attorney-in-fact to act for the principal in a subsequent transaction, but the attorney-in-fact has a duty to complete a transaction that the attorney-in-fact has commenced.
>
> (c) If an attorney-in-fact has expressly agreed in writing to act for the principal, the attorney-in-fact has a duty to act pursuant to the terms of the agreement. The agreement to act on behalf of the principal is enforceable against the attorney-in-fact as a fiduciary regardless of whether there is any consideration to support a contractual obligation.

Prob. Code § 4232. Duty of loyalty

This section should be revised as follows:

> 4232. (a) An attorney-in-fact has a duty to act in the interest of the principal and to avoid conflicts of interest. ~~This section is not subject to limitation in the power of attorney.~~
>
> (b) An attorney-in-fact is not violation of the duty provided in subdivision (a) solely because the attorney-in-fact also benefits from acting for the principal, has conflicting interests in relation to the

> property, care, or affairs of the principal, or acts in an inconsistent manner regarding the respective interests of the principal and the attorney-in-fact.

This revision recognizes that the attorney-in-fact is typically a family member who may have a technical conflict of interest and whose financial interests are entangled with those of the principal. Deletion of the second sentence in subdivision (a) will permit the principal to control the extent of this duty in the power of attorney.

Prob. Code § 4233. Duty to keep principal's property separate and identified

Subdivision (a) should be revised as follows:

> (a) The attorney-in-fact shall keep the principal's property separate and distinct from other property in a manner adequate to identify the property clearly as belonging to the principal. ~~This subdivision is not subject to limitation in the power of attorney.~~

This revision will permit the principal to control the extent of this duty in the power of attorney.

Prob. Code § 4234. Duty to keep principal informed and follow instructions

Subdivision (b) should be revised as follows:

> (b) With court approval, the attorney-in-fact may disobey instructions of the principal. ~~This subdivision is not subject to limitation in the power of attorney.~~

This revision will permit the principal to control the extent of this duty in the power of attorney.

Prob. Code § 4235. Consultation and disclosure of information

This section should be revised as follows:

> 4235. If the principal becomes wholly or partially incapacitated, or if there is a question concerning the capacity of the principal to give instructions to and supervise the attorney-in-fact, the attorney-in-fact may consult with a person previously designated by the principal for this purpose, and may also consult with and obtain information needed to carry out the attorney-in-fact's duties from the principal's spouse, physician, attorney, accountant, a member of the principal's family, or other person, business entity, or government agency with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests. A person from

> whom information is requested shall disclose relevant information to the attorney-in-fact. Disclosure under this section is not a waiver of any privilege that may apply to the information disclosed.

This revision makes the section more forceful while protecting the privileged information disclosed. A remedy to compel disclosure should be included in Section 4941.

Prob. Code § 4940. Petitioners

The principal's personal representative, successors in interest, and trustee should be included as permissible petitioners under this section.

Prob. Code § 4945. Notice of hearing

The draft of this section as proposed in the First Supplement was revised to eliminate misleading cross-references:

> 4945. ~~Subject to Sections 1202 and 1203,~~ At least 15 days before the time set for hearing, the petitioner shall serve notice of time and place of the hearing, together with a copy of the petition, on all of the following:
>
> (a) The attorney-in-fact if not the petitioner.
>
> (b) The principal if not the petitioner.
>
> By the force of draft Section 4905, these and other general rules apply to the power of attorney statutes in the Probate Code, making the cross-references unnecessary.

☐ APPROVED AS SUBMITTED

☐ APPROVED AS CORRECTED

(for corrections, see Minutes of next meeting)

_____

Date

_____

Chairperson

_____

Executive Secretary

Study J-1000

EXHIBIT

Minutes, January 6-7, 1994

Law Revision Commission

JAN 5 1994

File: _____

Key: _____

Judicial Council of California

ADMINISTRATIVE OFFICE OF THE COURTS

303 Second Street, South Tower • San Francisco, California 94107 • PHONE 415 396-9100 FAX 415 396-9349

January 5, 1994

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Mr. Sterling:

After reviewing the Law Revision Commission's Tentative Recommendations on Trial Court Unification, the Judicial Council's Policy Coordination Committee, on behalf of the full council, has amended its previous recommendations and authorized us to convey these revised recommendations to you.

The Judicial Council accepts and supports the Tentative Recommendations, with the following exceptions:

1. Court name: The council believes that the name of the unified court should be the "district court" rather than the "superior court." (Cal. Const. Art. VI, § 1) It is felt that the term "superior court" would be confusing to the public because the name suggests that there is also an inferior court, and because the newly-unified court would be confused with the former superior court. In addition, historical research will be hampered by the continued use of the same name for a different judicial entity.

2. Appellate jurisdiction: The council would change the commission's amended draft of the second sentence of the second paragraph of Article VI, § 11 to read as follows:

> The appellate division has appellate jurisdiction in criminal causes other than felonies, and in civil causes provided for ~~by statute or~~ by rule adopted by the Judicial Council not inconsistent with statute.

The council believes that deletion of the specified text makes the section clearer.

3. Judicial Council: Although the Law Revision Commission has stated that it considers the council's proposals to amend Article VI, § 6 as court reform measures rather than those necessary to implement trial court unification, the council believes that for court unification to be successful, the Judicial Council should be constitutionally empowered to fulfill its role as the administrative body responsible to act on behalf of the court system. The council believes that the following proposals are directly related to the issue of unification and would further its implementation:

a. **Three-year terms.** The council proposes that terms of membership on the council be changed from two to three years. The council has attempted to voluntarily establish a cycle of three-year terms for council members so that only one-third of its membership will turn over each year. It is felt that three-year terms will provide the needed continuity on the council so that important issues such as trial court funding and trial court unification will be addressed in a thorough and comprehensive manner.

b. **Court administrator members.** The constitutional addition of two non-voting court administrators would reflect the importance of their role during this major change to court unification. Court administrators have a unique and specialized expertise that is essential to the efficient operation of the court system and the continued delivery of services to the public. As policies related to court administration are debated within the judiciary, court administrators provide important input to the council during this process.

c. **Role of council and Chief Justice.** The council believes that by specifying in the Constitution that the Judicial Council is the policy-making body for the courts and the Chief Justice is the chief executive officer responsible for implementing rules of court, trial court unification will be expedited. The council suggests that commentary be added to this proposal explaining that the additional language is not intended to change current practice, but reflects the appropriate and existing roles of both the council and the Chief Justice in relation to the trial courts.

While we understand the Commission's reluctance to recommend that the council be given exclusive authority for adopting rules related to court administration - one of the council's earlier proposals - we do believe that the three proposals set forth above would further trial court unification by articulating the role of the council and the Chief Justice in the Constitution. The proposed language only reflects the intent of the existing constitutional language, as well as the actual practice of the council and the Chief Justice in recent years. Clarification of their respective roles as proposed will enhance implementation of unification.

With these modifications, the Judicial Council accepts and supports the Commission's Tentative Recommendations.

We would like to take this opportunity to express the council's appreciation for the significant work accomplished by the Law Revision Commission and its support for most of the proposals made by the council. In particular, we note that the commission's recommendation that judges shall be elected county-wide is sound as a matter of policy.

We also agree with the commission's recommendation that a judge will stand for election on the January 1 following three years in office. The recent exhaustive study on judicial retirement conducted for this office by A. Alan Post revealed that one of the biggest disincentives for attorneys considering application for judicial office is the prospect of having to run in an election soon after appointment to the bench.

Please contact either of us if you would like further information. Thank you again for the opportunity to comment.

Very truly yours,

William C. Vickrey

William C. Vickrey, Director

Roger K. Warren

Roger K. Warren, Chair
Trial Court Presiding Judges
Standing Advisory Committee

TA2/103